

No. 14853

United States
Court of Appeals
for the Ninth Circuit

WILLIAM V. BOGGESS, as Protestant on behalf
of the City of Fairbanks, Alaska, and THE
CITY OF FAIRBANKS, ALASKA,

Appellants,

vs.

BERRY CORPORATION, STEVE BOINICH
and UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILED

OCT 27 1955



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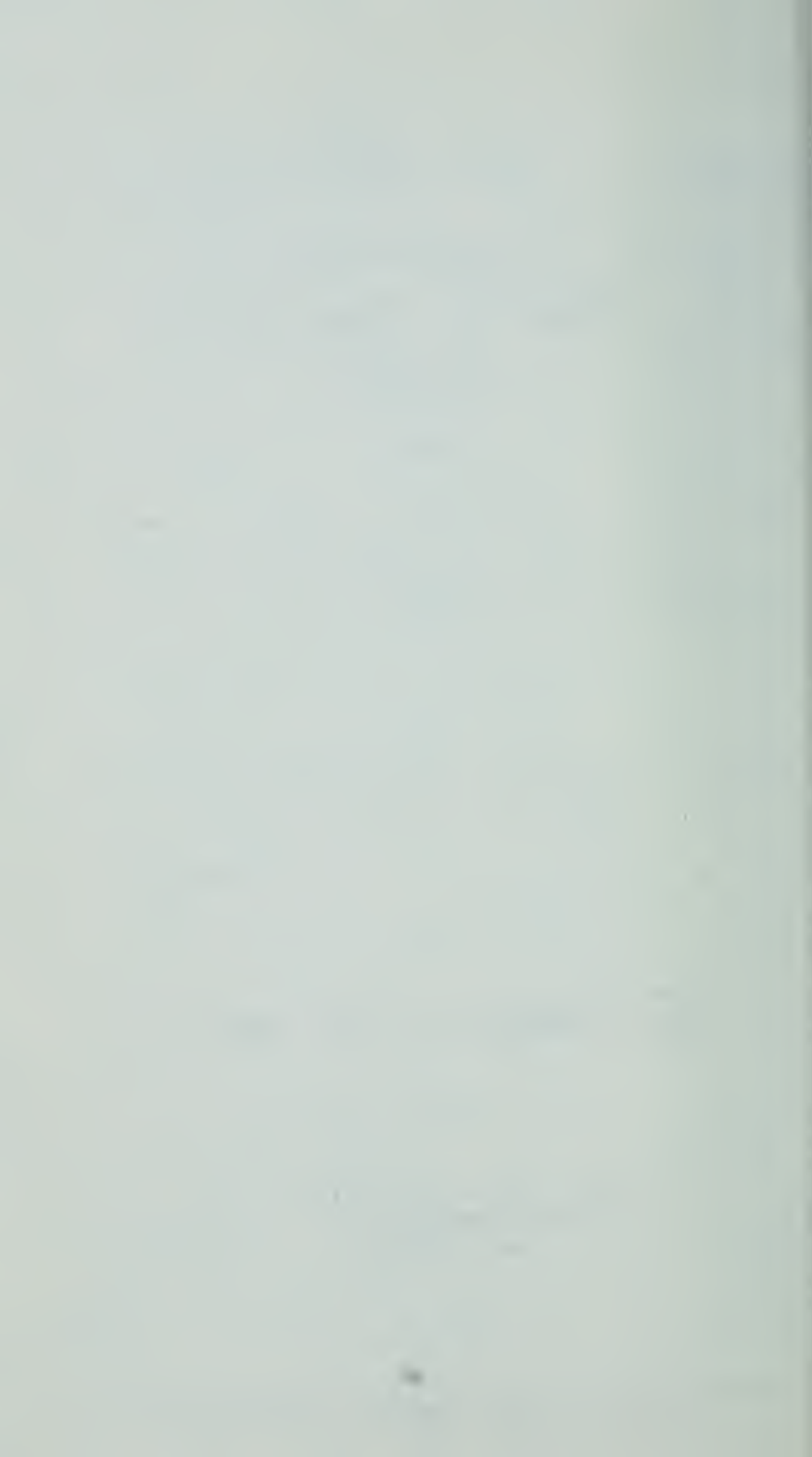
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Internal Revenue Service.



APPLICATION FOR LIQUOR LICENSE IN THE TERRITORY OF ALASKA

3

LICENSE NO.

APPLICATION NO.

Designated hereby applies for a license to ~~sell~~ **Transfer Bev. Disp. Liq. Lic #5581 from BERRY CORPORATION to STEVE BOINICH** for the year ending **12/31/02**

On **31, 1905**, and tenders herewith the sum of \$..... plus a Filing fee of \$20.00.

and address and how long a resident of Territory of Alaska?

Name

Address

How long a resident

a first application for license, or is it a renewal of license?

TYPE OF LICENSE APPLIED FOR

BOTTLE DISPENSARY

Qualification less than 1500) \$ 500.00

Qualification over 1500) 1,000.00

Minimum residence 1 year)

RESTAURANT 150.00

HOUSE 75.00

(Situating not less than 18 miles from incorporated city)

Incorporated at least 2 years) 200.00

of business to be conducted

548 2nd Ave., Fairbanks, Alaska

Give street and number.

by any public thoroughfare, street or alley, from any school or church?

a 200 feet, and not a renewal, show exact location on attached plat.

any other kind of liquor license, if so, what and where?

ments as to character and integrity of applicant, and desirability of issuing license applied for. (FIVE ENDORSERS MUST PERSONALLY BELOW)

Name	Address	Occupation	Residence in Territory
Herbert	542-4TH	Merchant	25 years
John A. Smith	Box 36, Fairbanks	Inspector	50 years
William A. Smith	839 Third Ave	Laborer	5 years
John A. Smith	1128 S. 4th Ave	Engineer	10 years
John A. Smith	Paper Bank	Owner	6 years

a citizen of the United States? If so, born or naturalized?

oration, are you qualified to do business in the Territory?

E OUTSIDE OF INCORPORATED TOWNS:

Attached hereto a petition containing the names of a majority of all citizens over the age of 21 years residing within 2 miles of the place where liquor is sold, bartered, manufactured, etc., and a complete census of that locality.

ANT DECLARES: If application is for Retail or Dispensary license, if an individual or association, that he has resided in or at least one year prior to the date of this application;

oration, that it is qualified to do business in Alaska;

ation is for a Beverage Dispensary or Retail Liquor license, that no corporation, wholesaler, owner, officer or representative, brewery, bottling works or distillery owns any interest in such business or has financed directly or indirectly the same in procuring capital or supplying equipment or furnishings in order to conduct such business;

ation on grounds other than the applicant has any direct or indirect financial interest in the business for which this license is applied for, or that he or she will superintend in person, the management of the business and if any other person is employed to manage it, that he or she will have the qualifications of an applicant and that applicant will be responsible for the proper conduct of

building, here described or referred to in which liquor is to be sold is 200 feet or more from any school building or church, or is a license that it is for a building in which the sale of intoxicating liquor was authorized by law on March

business is conducted; that the premises are not connected by doors or otherwise with premises upon which any business is conducted;

ation is for a Club license, that applicant has been incorporated under Territorial or National charter for two years or more.

Y CONSENT TO THIS TRANSFER:

SIGNED

Steve Boinich

Name of person or corporation

ORPORATION,

Signature of officer of corporation and Title

Attached letter re Internal Revenue.

Location of Corporation

ATES OF AMERICA) ss.
OF ALASKA

Steve Boinich

being first duly sworn on oath, deposes and says: I have read the

application and the facts therein stated are true.

Steve Boinich

Signature

libed and sworn to before me this

31st

day of

March

1905

John A. Smith

J. B. Swenson
Deputy Clerk

Title of Officer administering oath.

OVER



[Title of District Court and Cause.]

ORDER

Upon consideration of the facts set forth and the statements made by the applicant in the foregoing application, and all or any facts adduced in relation thereto, the Court finds that the applicant is entitled to the license applied for, and It Is Hereby Ordered that the same be issued.

Dated at Fairbanks, Alaska, this 18th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

No protest.

U. S. MARSHAL.

U. S. Treasury Department
Office of the Director of Internal Revenue

March 31, 1955,
Fairbanks, Alaska.

To Whom It May Concern:

Re: Transfer of Beverage Dispensary Liquor
License #5581 from 418 2nd Ave, Berry
Corp, Inc.
to: Steve Boinich at 548 2nd Ave
Fairbanks, Alaska

Seizure of all property or rights to property belonging to the above-named Corporation was made by this office on February 23, 1955. Authority for

this seizure is covered under Section 6331 of the Internal Revenue Code of 1954. Under this Authority the United States claims all rights of the Berry Corporation (whether real or personal, tangible or intangible) in the above-noted Territorial Liquor License #5581 issued to the Berry Corporation on December 31, 1954.

On March 30, 1955, all right, title and interest of the Berry Corporation in and to the Territorial Liquor License #5581 was sold at public auction by the undersigned Collection Officer, for the United States, to Steve Boinich of Fairbanks, Alaska.

The sale was conducted in accordance with the provisions of Subchapter D, Chapter 64 of the Internal Revenue Code of 1954 and the regulations promulgated thereunder.

In accordance with the above authority, the United States does hereby consent to the transfer of Territorial Liquor License No. 5581 to Steve Boinich at 548 2nd Ave., Fairbanks, Alaska.

Very truly yours,

WILLIAM E. FRANK,

District Director of Internal
Revenue;

By /s/ MAX B. PIERCE,

Collection Officer,

Box 1009

Fairbanks, Alaska.

[Endorsed]: Filed April 4, 1955. [2*]

[Title of District Court and Cause.]

MOTION FOR TRANSFER OF LIQUOR
LICENSE

Comes Now Steve Boinich, by and through his attorney, Eugene V. Miller, of the office of Taylor, Miller & Taylor, and moves this Honorable Court to transfer Beverage Dispensary Liquor License No. 5581 from the Berry Corporation to Steve Boinich, as per the sale conducted by the United States Marshal upon the execution of the United States Bureau of Internal Revenue and sold to the said Steve Boinich.

This Motion is made pursuant to the provisions of Section 35-4-13, ACLA, as amended in the 1953 Session Laws, Chapter 131, and pursuant to Sec. 35-4-19, ACLA 1949.

Dated at Fairbanks, Alaska, this 2nd day of April, 1955.

TAYLOR, MILLER & TAYLOR,

By /s/ EUGENE V. MILLER,
Of Counsel.

Service of Copy Acknowledged.

[Endorsed]: Filed April 4, 1955. [3]

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Einar Tonseth, City Clerk
City of Fairbanks
City Hall
Fairbanks, Alaska

You Are Hereby Notified that the undersigned will bring up for hearing before the United States District Court in Fairbanks, Alaska on the 7th day of April, 1955 at the hour of 1:30 p.m. in the afternoon, or as soon thereafter as counsel may be heard in the courtroom usually occupied by this Court in the United States Courthouse in Fairbanks, Alaska petitioner's Motion for Transfer of Liquor License No. 5581 from the Berry Corporation to Steve Boinich.

Dated at Fairbanks, Alaska this 2nd day of April, 1955.

TAYLOR, MILLER AND
TAYLOR,

Attorneys for Petitioner,

By /s/ EUGENE V. MILLER,
Of Counsel.

Service of Copy acknowledged.

[Endorsed]: Filed April 4, 1955. [4]

[Title of District Court and Cause.]

PROTEST

Comes Now William V. Boggess, City Attorney for the City of Fairbanks, Alaska, and protests against the transfer of liquor license sought by movant in the above-entitled cause and alleges and avers in support thereof as follows:

I.

That on March 31st, the movant, Steven Boinich, filed with the Clerk of this Court an application for transfer of the subject license, Beverage Liquor License #5581, which said application is of record herein.

II.

That said application was made on a form generally used for new licenses and contained the names of five persons as references to the integrity of the applicant, movant herein, in apparent compliance with Section 35-4-13, ACLA 1949, as amended by Chapter 131, S.L.A. 1953.

III.

That said application was subsequently referred to the City Council of the City of Fairbanks, Alaska, by the Clerk of this Court in apparent compliance with said Section 35-4-13 as amended, and the said City Council has not yet approved or disapproved of same.

IV.

That in said application, the applicant, movant herein, stated in effect that his business under said license, if transferred, was to be conducted at 548

Second Avenue which is a different location than that licensed under the license herein sought to be transferred, as evidenced by Item 5 of said application:

“5. Location of business to be conducted (Give Street and No.) 548 2nd Avenue.”

V.

That the license herein sought to be transferred was issued by the Clerk of this Court for a business to be conducted at 418 2nd Avenue in the City of Fairbanks, Alaska, and not for 548 2nd Avenue, as may be ascertained from the application therefor of the Berry Corporation, proposed transferor, which was filed with the Clerk of this Court on December 3rd, 1954.

VI.

That, as indicated by the aforesaid application of the movant, Steve Boinich, and by the proceedings had before this Court in Cause No. 8355 involving a protest by the United States of America against an attempted transfer of the same license, it is the intent and purpose of the movant to operate a beverage dispensary business at 548 2nd Avenue and not at the licensed premises, 418 2nd Avenue.

VII.

That the files and proceedings above-referred to are incorporated in this Protest to the same intent and purpose as if the same were fully set out herein.

VIII.

That on the 2nd day of April, 1955, the protested motion was filed herein and notice of hearing

thereon was served upon the City Clerk for the City of Fairbanks although no statutory authority or necessity therefor existed. That the inference to be drawn therefrom is that movant contends there is no necessity to procure the approval of the City Council in these proceedings.

IX.

That Section 35-4-14 ACLA 1949, referring to a class of licenses inclusive of the subject license, provides in part as follows: [6]

“All applicants for licenses mentioned herein shall file with the Clerk of the District Court
* * *.

“(1) * * *

“(2) A description of the place for which the license is desired, giving address by street and number, or other information, so that the location can be definitely determined;”

That Section 35-4-13 ACLA 1949, as amended by Chapter 131, S.L.A. 1953, with reference to liquor licenses to be issued outside of incorporated towns, requires the consent of “two-thirds of the citizens over the age of twenty-one years, residing within one mile of the place where intoxicating liquor is to be manufactured, bartered, sold or exchanged
* * *. ”

That Section 35-4-13, ACLA 1949, with reference to liquor licenses within incorporated towns, requires that the application therefor “have attached * * * at least five references as to the integrity of the

applicant and the desirability of issuing of a license for the premises mentioned therein” and requires the submission of such application to the City Council of such town for approval or disapproval.

That Section 35-4-15 ACLA 1949, Part (1), provides in part as follows:

“* * * and it shall be unlawful for any licensee to permit the giving, selling, bartering, or drinking of any intoxicating liquor within the premises covered by any license to or by any of the forbidden classes, nor shall such licensee permit the drinking of hard or distilled liquors by any person upon the premises covered by his license, unless the same is permitted under the classification of his license.”

That Section 35-4-15, Part 4, ACLA 1949, provides in full as follows:

“(4) Premises to be accessible for inspection. The premises of licensees under this Act shall be easily accessible for inspection by municipal officers, United States Attorneys, Assistant United States Attorneys, United States Marshals, Deputy Marshals and Clerks of the District Court, and all other [7] officers charged with the enforcement of the provisions of this Act, during all regular hours of the transaction of business upon said premises. For the purpose of this Act, the premises covered by any license issued hereunder, shall be held to include all rooms in any building which can be reached without leaving the building.”

X.

That it is manifest from the foregoing statutes that the subject license and any other Territorial Liquor License is confined to and permits the operation of a liquor business only on the premises designated in the application for such license. That a transfer of said license cannot confer upon the transferee any right to conduct such business upon different or other premises. That to establish a new business upon different premises would require an application for a new license subject to all of the precedures established therefor. That to hold otherwise would nullify the Territorial intent that the City Council within incorporated towns pass on the location of liquor businesses therein and that the affected residents without incorporated towns pass on the location of such businesses.

Wherefore, protestant prays that this Court deny the Motion for Transfer on file herein or, in the alternative, if granted, that the movant be ordered to conduct said business upon no other premises than those licensed, to wit: 418 2nd Avenue in the City of Fairbanks, Alaska.

/s/ WILLIAM V. BOGGESE,

Attorney for City of Fair-
banks, Alaska, Protestant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 7, 1955.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 8375

IN THE MATTER OF THE TRANSFER OF
BEVERAGE DISPENSARY LIQUOR LI-
CENSE No. 5581, FROM BERRY COR-
PORATION TO STEVE BOINICH

OPINION

This hearing came on before the Court on the motion of Steve Boinich for transfer of beverage dispensary license No. 5581. This license, previously issued to the Berry Corporation, was purchased by Steve Boinich from the United States after it had been seized through levy by the Internal Revenue Service. The motion was made pursuant to Sections 35-4-13, as amended, and 35-4-19, of the Alaska Compiled Laws Annotated, 1949. Section 35-4-13, as amended by Chapter 131, Session Laws of Alaska, 1953, provides in part that "No license issued under the provisions of this Act shall be transferred except after first securing the consent of the Court. No refund of license fees will be allowed after the issuance of license," and Section 35-4-19 provides in part that "no license shall be transferred by the licensee to any other person except with the written consent of the Court, but authority for the same shall issue upon application thereto in writing."

Notice of the motion was served upon the attorneys for Hubert F. Cox and upon the City of

Fairbanks. The motion was protested by the Polaris Investment Co., Inc., Hubert F. Cox, the Berry Corporation and the City of Fairbanks. The United States Attorney appeared in the action on behalf of the Internal Revenue Service and contended that under Section 35-4-19 the [10] Court was obliged to grant the application for transfer.

It seems to be admitted by the parties and the Court finds that, "Nothing in the law indicates that the Court is bound by the action of a city council, although the decision of the council is entitled to great respect and consideration. That the Court must exercise lawful and sound, and not arbitrary discretion in granting or reviewing licenses is beyond question. Apparently it is within the power of the Court to deny an application which has been approved by the council, and likewise within its power to approve an application which has been rejected by the council." In *Re Alaska Labor Trades Association*, 10 Alaska Reports Page 485.

There is no provision in the Alaska Code which requires that a motion for transfer of a liquor license be referred to the city council, nor is there a provision in the law which requires that a transfer of a liquor license be reviewed by the city council; nevertheless, the Court in this instance required notice of the motion to be served on the city thus giving the city an opportunity to voice its approval or disapproval of the contemplated transfer. The city council did not choose to either approve or disapprove the transfer. No one has questioned the

character of Mr. Boinich, the party seeking the transfer of the license, and no one has questioned the desirability or fitness of the premises to be licensed; instead, the City has filed a protest which the Court construes to be confined to the proposition that the owner of a liquor license is restricted by law to the sale of intoxicating liquors on the premises covered by such license. While that question is not before the Court in this hearing, the Court, nevertheless, approves the reasoning advanced by the city and believes that a license to sell intoxicating liquors in one location does not [11] permit the licensee to conduct such business in another location. But, the question now before the Court is whether such a license may be transferred from one location to another, and the Court holds that such a transfer can be accomplished under existing laws. The Court can find no reason to hold otherwise.

The statutes hereinbefore cited specifically provide that licenses may be transferred by the licensee with the written consent of the Court and it seems ridiculous to hold that the legislature intended to confine such transfer to transfers from person to person and to preclude transfers from place to place. Argument has been advanced that to permit a license to be transferred from place to place could and would work great injustices by fraudulently obtaining a license for a suitable or desirable place and then having the license transferred to some unsuitable or undesirable place. That argument fades away in the light of reason because the statutes

specifically provide that no transfer may be effected without the written consent of the Court, if sound the same argument would also apply to transfers from person to person. In the instant case, had a successful showing been made that the place to which the transfer is requested is an undesirable place, the Court could and would have denied the transfer. It has been well reasoned by the superior Courts of various jurisdictions that liquor licenses are properties of value to the licensee, his administrators, executors and assigns in jurisdictions where the licensee is given the right to assign subject to the approval of the Court or other issuing authority. If it is to be held that a license once issued must under all circumstances remain in the place originally licensed, much havoc would be wrought; the landlord or lessor of the licensed premises would, by the mere issuance of a license to his lessee, [12] own a greater property in the license than the licensee. The aforesaid statutes provide, *inter alia*, that no license fee shall be refunded; therefore, under the position taken by the city, a license duly issued for one location on January first would have utterly no value to the licensee if the licensed premises were destroyed by fire, or otherwise, on January second, even though the licensee had invested thousands of dollars in equipment to be moved into the licensed premises. It seems obvious to the Court that the legislature by the plain wording of the statutes did not intend such a result.

The protests filed by Polaris Investment Co., Inc., Hubert F. Cox and the Berry Corporation seek to

attack the validity of the sale of the license by the United States to Steve Boinich. The validity of such sale is not properly before the Court. The interests of Polaris Investment Co., Inc., Hubert F. Cox, R. P. Hill and Mary Hill in liquor license No. 5581 were perhaps before the Court in civil case No. 8355 wherein, on an agreed state of facts, the Court on March 29, 1955, decided that their claims to the license in question were not valid and their protests were denied.

The Court finds that under the applicable provisions of the Alaska Code pertaining to beverage dispensary licenses, only the approval of the Court is required for transfer of a license. Mr. Boinich having shown to this Court, without opposition, that he is a proper person to whom said license may be transferred, and having further shown, without opposition, that the location to which the transfer is desired is a suitable location, the transfer of the license to Mr. Boinich and to the location specified in his application is approved.

The motion for transfer having been granted, the Clerk [13] of this Court shall issue an appropriate certificate setting forth that beverage dispensary license No. 5581 is hereby transferred to Steve Boinich.

Dated at Fairbanks, Alaska, this 16th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed April 18, 1955. [14]

[Title of District Court and Cause.]

OPINION AND ORDER

The Court having taken the matter of the transfer of Beverage Dispensary License No. 5581 from the Berry Corporation to Steve Boinich on his application under advisement and now being fully advised in the premises, it was Ordered that the application of Steve Boinich for the afore-mentioned transfer be granted and that the clerk of this court issue said transfer to the applicant forthwith.

Entered April 18, 1955. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now Comes William V. Boggess, as Protestant on behalf of the City of Fairbanks, Alaska in the above-entitled cause and hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and decision of the above-entitled Court entered April 18th, 1955, transferring the above-described Territorial Liquor License from the Berry Corporation to Steve Boinich and to a different location than for which it was originally issued.

Dated at Fairbanks, Alaska, this 18th day of May, 1955.

/s/ WILLIAM V. BOGGESS,
Protestant on Behalf of the
City of Fairbanks, Alaska.

Receipt of copy acknowledged.

[Endorsed]: Filed May 18, 1955. [16]

[Title of District Court and Cause.]

APPEAL BOND

William V. Boggess, Protestant, Appellant herein, as Principal, and Paul R. Hagelbarger and Lois Tait, as sureties, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their, heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), that the Appellees may be put to, or allowed, if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said sureties hereby irrevocably appoint the Clerk of the above-entitled Court as their agent upon whom any papers affecting their liability on this undertaking may be served.

Signed, sealed and delivered this 18th day of May, 1955.

/s/ WILLIAM V. BOGGESS,
Principal, Appellant.

/s/ PAUL R. HAGELBARGER,

/s/ LOIS TAIT,
Sureties.

United States of America,
Territory of Alaska—ss.

Paul R. Hagelbarger and Lois Tait, each being duly sworn, say: That I am a surety on the foregoing Appeal Bond; that I am a resident within the District of Alaska; that I am not a counselor or attorney at law, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of \$250.00 over and above all debts and liabilities and property exempt from execution.

/s/ PAUL R. HAGELBARGER,

/s/ LOIS TAIT.

Subscribed and sworn to before me this 18th day of May, 1955.

[Seal] /s/ CLAUDIA STUDEBAKER,
Notary Public for Alaska.

My commission expires 3/11/59.

[Endorsed]: Filed May 18, 1955. [17]

[Title of District Court and Cause.]

ORDER

Pursuant to Rule 73 of the Federal Rules of Civil Procedure, it is hereby ordered that the time for the filing of the record on appeal and the docketing of the appeal in the United States Court of Appeals for the Ninth Circuit be extended until the 10th day of August, 1955.

Done and Ordered Entered this 24th day of June, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered June 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below comprise all proceedings listed on the Designations of Record of the respective parties herein, viz.:

- 1—Application for liquor license transfer with letter from Internal Revenue Service attached.
- 2—Motion for Transfer of liquor license.
- 3—Notice of Hearing.
- 4—Protest of City of Fairbanks against transfer.
- 5—Opinion of the Court re transfer.
- 6—Opinion and Order re the transfer.

7—Notice of Appeal.

8—Appeal Bond.

9—Order extending time to docket appeal.

10—Statement of Points.

11—Designation of Record of Appellant, City of Fairbanks.

12—Affidavit of Service of No. 10 and 11 above.

Witness my hand and the seal of the above-entitled Court this 8th day of August, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14,853. United States Court of Appeals for the Ninth Circuit. William V. Boggess, as Protestant on behalf of the City of Fairbanks, Alaska, and the City of Fairbanks, Alaska, Appellants, vs. Berry Corporation, Steve Boinich and United States of America, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed August 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14,853

In the Matter of

The Transfer of Beverage Dispensary Liquor License No. 5581, from BERRY CORPORATION to STEVE BOINICH;

CITY OF FAIRBANKS, ALASKA,

Appellant.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Pursuant to Rule 17 of the rules of the above-entitled Court, the Appellant City of Fairbanks, Alaska, hereby states that the points upon which it intends to rely upon this appeal are that the District Court for the District of Alaska, Fourth Division, erred in holding that a liquor license issued pursuant to the laws of the Territory of Alaska could be transferred from location to location and in ordering the liquor license, subject to the proceedings in the said District Court, to be so transferred.

That the entire record as certified to this Court is material to the consideration of this appeal.

Dated at Fairbanks, Alaska, this 12th day of August, 1955.

/s/ WILLIAM V. BOGGESS,
Attorney for City of Fairbanks, Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 17, 1955.